

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of BECKY and JOHN
VAN DOORN.

BECKY VAN DOORN,

Respondent,

v.

JOHN VAN DOORN,

Appellant.

SAN DIEGO COUNTY DEPARTMENT
OF CHILD SUPPORT SERVICES,

Intervenor and Respondent.

D051063

(Super. Ct. No. D449393)

APPEAL from an order of the Superior Court of San Diego County, Randall
Magnuson, Commissioner. Affirmed in part; reversed in part; remanded with directions.

I.

INTRODUCTION

In September 2005, Becky Van Doorn (Becky) filed a motion seeking to modify a 2003 order that directed her former husband, John Van Doorn (John), to pay child support. The trial court granted Becky's motion and ordered John to pay additional child support.

On appeal, John claims that the trial court erred in calculating two of the components necessary for determining the amount of child support to be awarded pursuant to the state uniform guideline for determining child support (guideline child support). (Fam. Code, § 4055.)¹ John contends that the trial court refused to calculate Becky's income, and that the court erroneously found that John's timeshare² with the children was zero percent. John also claims that the trial court erred in denying his requests for a continuance of the hearing on Becky's motion. Finally, John claims that the manner by which the trial court considered Becky's motion violated both his right to due process and provisions of the Evidence Code that preclude the admission of hearsay evidence.³

¹ Unless otherwise specified, all subsequent statutory references are to the Family Code.

² The word "timeshare" is used to refer to the "approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent" (§ 4055), and is a component of the formula for calculating guideline child support. (See *DaSilva v. DaSilva* (2004) 119 Cal.App.4th 1030, 1033.)

We conclude that the trial court erred in implicitly finding that John's timeshare is zero percent.⁴ We remand the matter to the trial court with directions to determine the percentage of John's timeshare, based on the evidence previously admitted pursuant to Becky's motion, and to recalculate the child support award. We affirm the order in all other respects.

II.

FACTUAL AND PROCEDURAL BACKGROUND

John and Becky were married in 1986. They have six children. In February 2001, the trial court entered a judgment of marital dissolution. The judgment provided that John was to pay to Becky a total of \$3,558 per month in child support.

In May 2003, the trial court entered an order setting aside the child support award, in part on the ground that Becky had "committed perjury in regard to the Income and Expense Declaration she filed February 8, 2001, in conjunction with the trial." The trial court ordered John to pay Becky \$2,475 per month in child support. In February 2005, this court affirmed the trial court's May 2003 order.

In September 2005, Becky filed a motion to modify the May 2003 child support order on the grounds that John's income had increased, and his timeshare with the children had decreased. In October 2005, Becky filed a financial statement that indicated

³ Intervenor San Diego County Department of Child Support Services (the Department) filed a respondent's appellate brief. Becky has not filed a brief on appeal.

that her current gross income was zero. John filed an opposition to Becky's motion in which he requested that the May 2003 order remain in effect on the ground that Becky had failed to fully disclose her financial condition to the court.

In December 2005, the trial court held a hearing on Becky's motion. At the hearing, Becky maintained that she had no income. John claimed that Becky had gone "underground" with her income. The court noted that John did not have a current income and expense declaration on file. The trial court appointed Attorney Eugene McMurdy as a special master to develop a recommendation to the court regarding the parties' incomes, for purposes of determining guideline child support.

Throughout 2006, Becky and John produced various documents to Attorney McMurdy that were relevant to a determination of their incomes. In December 2006, Attorney McMurdy filed a report with the court regarding the parties' incomes. John and Becky each filed declarations in response to Attorney McMurdy's report. On January 5, 2007, the trial court held a hearing on Becky's motion. On January 12, the trial court issued an oral ruling granting Becky's motion, ordering John to pay child support to Becky in the amount of \$4,297 per month for the period October 1, 2005 through June 30, 2006, \$4,256 per month for the period July 1, 2006 through June 30, 2007, and \$3,701 per month thereafter. On April 5, 2007, the trial court entered written findings and an order in accordance with its January 12 oral ruling.

John timely appeals from the April 5, 2007 order.

4 In its oral and written rulings, the trial court stated that John was not exercising

III.

DISCUSSION

A. *The trial court's determination of the amount of guideline child support*

John claims that the trial court erred "in refusing to calculate Becky's income" in modifying the May 2003 child support order. John contends that the trial court determined that Becky's income was irrelevant to the court's determination of the amount of guideline child support based on the court's erroneous conclusion that John was not exercising his visitation rights. John claims that there is no substantial evidence to support the trial court's finding that he was not exercising his visitation rights for purposes of determining guideline child support.

1. *Standard of review*

In *In re Marriage of Williams* (2007) 150 Cal.App.4th 1221, the court outlined the standard of review that appellate courts should apply in reviewing an order modifying a child support award:

" [A] determination regarding a request for modification of a child support order will be affirmed unless the trial court abused its discretion, and it will be reversed only if prejudicial error is found from examining the record below.' [Citations.] Thus, '[t]he ultimate determination of whether the individual facts of the case warrant modification of support is within the discretion of the trial court. [Citation.] The reviewing court will resolve any conflicts in the evidence in favor of the trial court's determination. [Citation.].' [Citation.]

"However, as this court has previously observed, 'the trial court has "a duty to exercise an informed and considered discretion with

visitation, thereby suggesting that the court found that John's timeshare was zero percent.

respect to the [parent's child] support obligation. . . ." [Citation.] Furthermore, "in reviewing child support orders we must also recognize that determination of a child support obligation is a highly regulated area of the law, and the only discretion a trial court possesses is the discretion provided by statute or rule. [Citations.]" [Citation.] In short, the trial court's discretion is not so broad that it "may ignore or contravene the purposes of the law regarding . . . child support. [Citations.]" [Citation.]" [Citation.]" (*Id.* at pp. 1233-1234.)

2. *Factual and procedural background*

In December 2005, at a hearing on Becky's September 2005 motion to modify the May 2003 child support order, the Department's counsel suggested that the trial court appoint a special master to determine "what income is available for purposes of support." The trial court agreed, and appointed Attorney McMurdy as a special master to "assist the Court in determining the nature and extent of the parties' income for purposes of calculating guideline [child] support."

In December 2006, Attorney McMurdy filed a report with the trial court. In his report, Attorney McMurdy noted that Becky claimed that she had no income, and that she had been living primarily on funds obtained from the refinancing of a mortgage on her house and a home equity line of credit. Attorney McMurdy further stated, "Based solely on the documents produced, I believe Wife's income is zero at this time." However, Attorney McMurdy stated that he made the recommendation with "reservations," because "[i]t is possible that additional records would reveal other income sources."

During a January 5, 2007 hearing on Becky's motion, Becky testified that she had obtained a real estate license. The trial court asked Becky whether she had ever earned income from selling real estate. Becky responded that she had not.

On January 12, the trial court orally ruled on Becky's motion to modify the child support order, stating in relevant part:

"[B]ased upon the evidence presented, the court makes the following findings and order: One, there is no evidence that [Becky] has been gainfully employed during the relevant periods of this order or has any income apart from the child support received from the father and from withdrawals from the home equity loan averaging \$8,500 per month during the relevant time periods."

After the trial court issued its ruling, John asked the court, "May I have a statement of decision as to why [Becky's] income is not being considered?" The court responded, "Her income is not being considered because the visitation is not being exercised, so it doesn't matter what her income is. It doesn't have an impact on the guideline child support."

In its April 2007 written findings, the trial court stated:

"There is no evidence that [Becky] has been gainfully employed during the relevant period of this order or that she has had any income apart from the child support received from [John] and from withdrawals from the home equity loan averaging \$8,500 per month during the relevant time period."

The court also stated in its written findings, "Visitation is not being exercised; therefore [Becky's] income is not relevant."

3. *Governing law*

Section 4055 provides in relevant part:

"(a) The statewide uniform guideline for determining child support orders is as follows: $CS = K [HN - (H\%) (TN)]$.

"(b)(1) The components of the formula are as follows:

"(A) CS = child support amount.

"(B) K = amount of both parents' income to be allocated for child support as set forth in paragraph (3).

"(C) HN = high earner's net monthly disposable income.

"(D) H% = approximate percentage of time that the high earner has or will have primary physical responsibility for the children compared to the other parent. In cases in which parents have different time-sharing arrangements for different children, H% equals the average of the approximate percentages of time the high earner parent spends with each child.

"(E) TN = total net monthly disposable income of both parties."

4. *The trial court did not refuse to calculate Becky's income in determining the proper amount of guideline child support*

The trial court appointed a special master for the purpose of assisting the court in determining the parties' incomes (a required component of the formula for determining the amount of guideline child support), received a report from the special master regarding that subject, questioned Becky regarding her income at the hearing on the motion, and made oral and written findings that there was no evidence that Becky had any earned income during the relevant time period. The court specifically found that there was no evidence that Becky had been employed or that she had had any income, apart from child support and withdrawals from a home equity line of credit, during the relevant time period. Thus, we conclude that the trial court found that Becky's income was zero for purposes of determining the proper amount of child support.⁵

⁵ In a declaration in support of his January 22, 2007 motion for reconsideration, John stated, "[T]he Court found that [Becky] had no income during the relevant period. . . ."

We reject John's suggestion that the trial court's oral statement that Becky's income was "not being considered" indicates that the court failed to make a finding as to her income. The trial court's statement in this regard was an impromptu response to John's question, made after the trial court had already issued its oral finding regarding Becky's income. Further, even assuming that the trial court's statement was incorrect, John was not prejudiced by the court's statement, because, as noted above, the court found that Becky had no earned income.⁶

5. *The trial court erred in suggesting that John's timeshare was zero*

The trial court did not make any express findings in either its oral or written rulings regarding John's timeshare. However, the trial court's statement that John was not exercising his visitation rights suggests that the court may have determined that John's percentage of timeshare was zero. We have been unable to find any substantial evidence in the voluminous record to support such a finding. As both John and the Department note, at several places in the record Becky argued that John's timeshare was low, but she did not contend that it was zero. For example, in an exhibit attached to a July 17, 2006

⁶ In his reply brief John claims, "THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDINGS OF THE COURT AS TO BECKY'S INCOME." However, John provides no good reason for why he presents this contention for the first time in his reply brief. Accordingly, we decline to consider the claim. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10 [" 'points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before' "].) At oral argument, John claimed that the trial court erred in failing to impute income to Becky based on her earning capacity. John's brief did not raise this contention, and therefore, we decline to consider it. (See *Waltrip v. Kimberlin* (2008) 164 Cal.App.4th 517, 529 ["We need not consider an argument raised for the first time at oral argument"].)

declaration, Becky stated that John exercised "custody" of the children 2.93% of the time in 2005 and .44% of the time between January 1 and July 14, 2006.⁷ At the January 5 hearing, Becky stated, "I have almost one hundred percent custody. I would say 99 percent. I have .44 is what I calculated out." The Department acknowledges on appeal that "the evidence in the record does not support a finding that [John's] timeshare was zero."⁸

Under these circumstances, we agree with the Department that "[b]ecause timeshare is an integral component for calculating guideline child support," the matter should be remanded to the trial court with directions to determine the amount of John's timeshare based on the evidence previously submitted, and to thereafter recalculate the child support award.

B. *The trial court did not deny a request by John to continue the hearing on Becky's motion*

John claims that the trial court erred in denying his requests to continue the hearing on Becky's motion. We conclude that John has failed to demonstrate that he made any such request.

In his brief, John claims that he made the following "request[s] for a continuance," of the hearing on Becky's motion:

"John made a request for a continuance as soon as he knew that he received the [s]pecial [m]aster report too late to be able to

⁷ We interpret Becky's use of the term "custody" to refer to the amount of time that John had "primary physical responsibility for the children" (§ 4055.)

⁸ As noted previously, Becky has not filed a brief on appeal.

competently respond. [Citation.] He made his point again during the court hearing. [Citation.] He moved before the intended decision was made known. [Citation.] He even filed an objection after the decision — but prior to the formal order. [Citation.]"

With respect to John's first purported request for a continuance, John claims that he did not receive the special master's report until November 28, 2006. John contends that on December 1, he requested a continuance of the December 9 hearing on Becky's motion, but that the trial court never ruled on his request. John misstates the record. The hearing on Becky's motion was held on January 5, 2007, not December 9, 2006. Further, John did not request a continuance of the hearing on Becky's motion on December 1. Rather, on that date, John filed a declaration in which he sought to have until December 12 to respond to the special master's report.⁹ We therefore reject John's claim that he requested a continuance of the hearing on Becky's motion on December 1.

John claims that he "made his point again during the court hearing" However, the record does not support John's suggestion that he requested that the trial court continue the hearing during the hearing itself. In support of his claim, John cites a portion of the hearing transcript in which he stated the following:

⁹ In his declaration, John stated that the special master initially sent the report to John's former address. John stated that as a result, he did not receive the report until November 28. John noted that the trial court had previously ordered that each party was to have 10 days to respond to the report. John requested that the court grant him "ten working days," or until December 12 to file a response to the report. John did not file his response until December 14, 2006. Although the trial court apparently did not expressly rule on John's request, John has not identified anything in the record to indicate that the court refused to consider his response to the special master's report, or that he had less time than the "ten working days" that he requested to respond to the report.

"That pretty much does it with Mr. McMurdy's report other than for the cost involved. There was a lot of requests on my part for further discovery on [Becky]. If you take a look, I brought all the documents I presented to Mr. McMurdy. It's several hundred pages there versus what I received from [Becky], as far as discovery. I itemized those in my declaration. As well as all the credit card[s] that show up on her credit report that I don't have any records for.

"So I am in no position to evaluate Mr. McMurdy's report or even have a chance to lay any claim as to whether [Becky] has any income. I have been shut out. This is in violation of the Code of Civil Procedure."

John's argument that he had not had received adequate discovery to allow him to respond to Attorney McMurdy's report does not constitute a request that the trial court continue the hearing.

Finally, John suggests that he made two *post*-hearing requests to continue the hearing. The first such alleged request is actually a separate motion that John filed on January 10, 2007, in which he requested that the court "deny [m]otions requested by [Becky]," and "[p]rovide additional [d]iscovery pursuant to . . . Family Code [, section] 3662." The second request is a January 22, 2007 motion for reconsideration in which John again sought "LEAVE TO COMPLETE DISCOVERY" on the issue of Becky's income and earning capacity. Post-hearing requests to grant leave to allow additional discovery do not constitute requests to continue the hearing.¹⁰

¹⁰ John's opening brief contains a heading entitled, "THE TRIAL COURT ERRED IN ITS HANDLING OF JOHN'S CONTINUANCE REQUEST." We address that claim in the text. In making this claim, John also suggests that the trial court erroneously denied his requests to conduct additional discovery. However, John fails to separately and adequately articulate such a claim. "Because this argument is not presented under a

Accordingly, we conclude that the trial court did not deny a request by John to continue the hearing on Becky's motion.

C. *The trial court did not violate John's right to due process or provisions of the Evidence Code by the manner in which it considered Becky's motion*

John claims that the procedures by which the trial court considered Becky's motion violated his right to due process and also violated provisions in the Evidence Code that preclude the use of hearsay evidence. We assume for the sake of argument that the de novo standard of review applies to this claim. (See *People v. Albarran* (2007) 149 Cal.App.4th 214, 225, fn. 7 ["Because the present case . . . implicates defendant's federal constitutional rights to due process and concerns the fundamental fairness of his trial, we will apply the de novo standard of review"].)

John's primary argument is that the procedures by which the trial court considered Becky's motion are inconsistent with the Supreme Court's decision in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 (*Elkins*). In *Elkins*, the Supreme Court concluded that it is improper for a trial court to admit hearsay declarations at a contested marital dissolution trial. (*Id.* at p. 1345.) The *Elkins* court reasoned:

"[P]ursuant to state law, marital dissolution trials proceed under the same general rules of procedure that govern other civil trials. Written testimony in the form of a declaration constitutes hearsay and is subject to statutory provisions governing the introduction of such evidence. Our interpretation of the hearsay rule is consistent with various statutes affording litigants a 'day in court,' including the opportunity to present all relevant, competent evidence on material

separate heading, it is forfeited. ([Citation]; Cal. Rules of Court, rule 8.204(a)(1)(B).)" (*In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 294.)

issues, ordinarily through the oral testimony of witnesses testifying in the presence of the trier of fact." (*Ibid.*)

In this case, John claims that the trial court violated *Elkins* by admitting in evidence hearsay declarations and by "not allow[ing] any real direct examination of either party and, certainly, no cross[-]examination."

Although John claims that the procedures the trial court employed violated his right to due process, the *Elkins* court based its holding solely on state statutory law, and did not consider whether the procedures at issue in that case violated "petitioner's right to due process of law." (*Elkins, supra*, 41 Cal.4th at p. 1357.) *Elkins* thus does not support John's constitutional arguments. John cites no other authority to support his contention that a court's admission of hearsay declarations and its restriction of live testimony at a hearing on a motion to modify child support violates a party's right to due process.

Citing *Elkins*, John also argues that the procedures the trial court used in this case were inconsistent with provisions of the Evidence Code that preclude the use of hearsay evidence. However, the principles enumerated in *Elkins* pertain to marital dissolution trials leading to a judgment, and do not apply to hearings on motions in postjudgment modification proceedings. The *Elkins* court expressly stated, "Our conclusion does not affect hearings on motions." (*Elkins, supra*, 41 Cal.4th at p. 1344, fn. 1; see also *id.*, at p. 1363 ["we have drawn a distinction between hearings at which a judgment is entered, and hearings on postjudgment motions"]); Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group 2005) ¶ 5:492 [stating that in family law cases the "court generally is not required to take oral testimony or receive additional evidence in motion

matters, but may exercise its discretion to grant or deny relief solely on the basis of the written application, response, supporting and opposing declarations and supporting and opposing memoranda" and stating "[t]he rule is otherwise at contested trials leading to a judgment," citing *Elkins*].)

In any event, assuming for the sake of argument that *Elkins* applies not only to marital dissolution trials but also to postjudgment motion modification proceedings, the trial court did not commit reversible error by the manner in which it conducted the hearing on Becky's motion. As to John's claim that the trial court erred by considering the parties' declarations, the *Elkins* court stated, "It is well established . . . that declarations constitute hearsay and are inadmissible at trial, subject to specific statutory exceptions, unless the parties stipulate to the admission of the declarations *or fail to enter a hearsay objection*." (*Elkins, supra*, 41 Cal.4th at p. 1354, italics added.) John fails to identify any hearsay objection that he lodged at trial to the court's consideration of the numerous declarations that both parties filed in the case. Similarly, John does not suggest that he requested the opportunity to cross-examine Becky.¹¹ Thus, John has forfeited this contention. (E.g., *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Ass'n* (2008) 163 Cal.App.4th 550, 564 ["Failure to raise specific challenges in the trial court forfeits the claim on appeal"].) Finally, we reject John's contention that the court did not allow "real" direct examination. Both John and Becky testified under oath at the January 5 hearing in front of the trial court, the ultimate fact finder in the case.

¹¹ The trial court questioned each of the parties at the January 5, 2007 hearing.

In addition to claiming that the procedures the court employed in considering Becky's motion are inconsistent with *Elkins*, John raises a series of objections to the trial court's use of a special master. First, John contends that there was "no record" of the manner by which the trial court appointed the special master. We disagree. The record contains both the reporter's transcript of the hearing at which the trial court appointed the special master, as well as a written order entitled "ORDER RE: APPOINTMENT OF REFEREE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 639 [subdivision] (a)(2)." Both the reporter's transcript and the written order make clear that the trial court appointed the special master to assist the court in determining the parties' income, for purposes of determining child support.

John also suggests that the special master violated John's right to due process by failing to hold a hearing and by considering documents that John had not seen. However, John identifies no statutory or constitutional basis for his claim that the special master was required to utilize trial-like procedures in formulating a recommendation to the trial court regarding the parties' incomes. John also argues that the trial court erred in delegating to the special master the actual determination of the parties' incomes, stating, "the court didn't even review the bulk of the evidence," and "the parties were entitled to a hearing on the legal and factual issues of their respective income before a judge" The record refutes John's contentions. The trial court held a hearing at which it received sworn testimony concerning the parties' incomes. In addition, the court expressly stated that it had reviewed the evidence in the case.

Accordingly, we conclude that the trial court did not violate John's right to due process or state law by the manner in which it considered Becky's motion.

IV.

DISPOSITION

The April 5, 2007 order is reversed in part. The case is remanded to the trial court with directions to determine the amount of John's timeshare based on the evidence previously submitted, and to thereafter recalculate the child support award. The April 5, 2007 order is affirmed in all other respects. Each party is to bear his or her own costs on appeal.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.